

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BARBARA HIGGINS	:	DETERMINATION
	:	DTA NO. 819004
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
the Period September 1, 1998 through August 31, 1999.	:	

Petitioner, Barbara Higgins, 47 Duke Drive, Carmel, New York 10512, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1998 through August 31, 1999.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on May 8, 2003 at 1:15 P.M. Petitioner appeared by Daniel T. Mentzer, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Rasik Sanghvi).

Since neither party elected to reserve time to file a brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether petitioner was a responsible officer of TAM Properties, Inc. and, as such, personally liable, in accordance with Tax Law §§ 1131(1) and 1133(a), for payment of the sales and use taxes, penalties and interest due from said corporation.

FINDINGS OF FACT

1. TAM Properties, Inc., (hereinafter “TAM”) was incorporated in New York State on June 1, 1998. TAM, d/b/a North Woods Inn, owned and operated a small hotel, approximately 25 to 30 rooms, located on Route 28, 4th Lake, Old Forge, New York. Also adjoining the hotel was a bar and restaurant.

2. On September 20, 1998, TAM filed a timely New York State and Local Quarterly Sales and Use Tax Return for the quarter ending August 31, 1998 reporting thereon gross sales of \$77,094.00, taxable sales of \$75,658.00 and a tax due of \$6,007.25. Both the return and the check submitted in payment of the tax due were signed by W. John Hyla, TAM’s treasurer. TAM did not file sales and use tax returns for the next four quarters ending November 30, 1998, February 28, 1999, May 31, 1999 and August 31, 1999.

3. On September 5, 2000, the Division of Taxation (“Division”) issued four notices of estimated determination to petitioner, Barbara Higgins, asserting that as an “Officer/Responsible Person” of TAM she was personally liable for payment of the tax, penalty and interest due and owing from the corporation. Since TAM had failed to file returns for the period at issue herein, the Division estimated the tax due to be \$6,007.25 for the three quarters ending November 30, 1998, February 28, 1999 and May 31, 1999 and \$7,509.06 for the quarter ending August 31, 1999. In addition to the assessed tax due, the four notices of estimated determination also asserted that interest and penalty were due.

4. Approximately 25 years ago, petitioner’s parents acquired the North Woods Inn, and for some 10 to 12 years petitioner’s father and uncle ran the business. In the late 1980s petitioner’s uncle resigned from the business and the inn was closed. The building sat idle for the next 10 years, and it fell into a state of disrepair.

5. In 1997 petitioner and her mother visited the inn with the idea of turning it into a personal family vacation spot. It was noted that the inn was in need of substantial repairs and petitioner's parents, who live and work in New Jersey, contacted W. John Hyla, a local building contractor. In addition to operating a construction company, Mr. Hyla also owned several housekeeping cottages approximately one mile from the inn. Mr. Hyla believed that the inn was located in a great spot and he approached petitioner's parents with a plan wherein he would make all repairs to the inn and also manage its day-to-day activities.

6. Petitioner's parents operated their own business in New Jersey and were too busy to get involved with the renovation and subsequent operation of the inn. Accordingly, petitioner's parents accepted Mr. Hyla's offer to restore and operate the inn and they provided the funds necessary to do so.

7. At the time that TAM was incorporated, petitioner was designated as president and she was a 50% stockholder. Petitioner's brother, James R. Murphy III, was designated vice-president/secretary and he owned the remaining 50% of TAM's outstanding stock. W. John Hyla was appointed as treasurer of TAM; however, he owned no stock in the company.

8. Petitioner's parents arranged to have petitioner and her brother named as officers of TAM with each holding one-half of the outstanding stock of the corporation. Petitioner believes that they did so "as some kind of inheritance." Petitioner made no financial contribution whatsoever to TAM and did not draw a salary or receive any other form of compensation from the corporation.

9. During the period at issue herein, petitioner, together with her husband and two children, lived in Maywood, New Jersey, a five and one-half hour drive to Old Forge, New York. Petitioner, for the period in question, was a full-time homemaker and mother of two children,

ages four and two. The youngest of petitioner's two children was severally autistic and thus required a great deal of petitioner's time and energy.

10. Petitioner was not active in TAM's day-to-day operation, made no decisions regarding business or financial matters, did not determine which creditors to pay and did not hire or fire employees. Petitioner had authority to sign corporate checks; however, she never signed checks and, in fact, did not even know where the checkbook was located. For the period in dispute, all checks were signed by W. John Hyla and he was the one who was responsible for running the inn and making all business and financial decisions.

11. Petitioner visited the inn no more than a couple of weekends each year; however, she did not stay there when she visited. Any information that petitioner received regarding the inn came from her parents and if she received any mail at home pertaining to the inn it was given to her parents.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article." As relevant to this proceeding, a person required to collect tax is defined in Tax Law § 1131(1) to include "any officer, director or employee of a corporation or of a dissolved corporation . . . who as such officer, director . . . is under a duty to act for such corporation . . . in complying with any requirement of this article. . . ." Petitioner bears the burden of proving that the particular facts of this matter support her position that she was not a person under a duty to act for TAM (*see, Matter of McHugh*, 70 AD2d 987, 417 NYS2d 799; *Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, *annulled in part* 204 AD2d 916, 612

NYS2d 503, *modified* 86 NY2d 165, 630 NYS2d 680, *cert denied* 516 US 989, 133 L Ed 2d 426).

B. The determination of whether an individual is a person under a duty to act for a business operation is based upon a close examination of the particular facts of the case. In *Matter of Moschetto* (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation.

C. The factual nature of the analysis required in this matter is reflected by the Tribunal's decision in *Moschetto (supra)*, which reversed the determination of the Administrative Law Judge ("ALJ"), who had denied the taxpayer's petition. In deciding against the petitioner, the ALJ relied on the following facts: (i) the officer received substantial income from the business, (ii) he influenced the hiring of employees and supervised employees, (iii) he had check-signing authority and signed checks; (iv) he had signed one sales tax check; and (v) was a shareholder, a member of the board of directors and had signed an unlimited guarantee with a bank on behalf of the corporation. The Tribunal decided that the above facts relied on by the Administrative Law Judge were "not sufficient, given the entire circumstances of petitioner's involvement in City Chrysler, to sustain the conclusion that petitioner had a duty to act for the corporation in complying with the requirements of the sales tax law" (*Matter of Moschetto, supra*). The

Tribunal noted: (i) the officer received the same salary after he became a shareholder as he had when he was only a manager of service and parts and the amount of income received (\$600.00 a week in 1987 through 1989) did not suggest that he was a responsible officer (when sales tax asserted due was approximately \$400,000.00); (ii) the officer did not hire and fire without the approval of a Sheldon Reynolds, who had the real authority in the business; (iii) his check-signing authority and check-signing activities were circumscribed; and (iv) the officer in fact had little actual authority over the corporation's affairs, in spite of his titles and investment. In summary, the Tribunal emphasized its similar decision in *Matter of Constantino (supra)*, where it stated that "petitioner's role was essentially that of a minority investor and supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation."

D. Examination of the entire record in the instant matter leads to the conclusion that petitioner was not a responsible person under a duty to act on TAM's behalf with respect to the collection and remittance of sales and use taxes imposed under Articles 28 and 29 of the Tax Law. Although petitioner's status as president of TAM and the owner of 50% of its stock, coupled with the fact that she possessed authority to sign checks, might support a determination that she was a responsible person, I have arrived at a contrary conclusion based on other more compelling factors. Specifically, it is noted that petitioner did not make a conscious and voluntary decision to become an officer and stockholder of TAM, but instead was placed in this position by her well-intentioned parents who apparently viewed this as a gift. Petitioner did not make any financial contribution or investment in TAM and she drew no salary or other form of compensation from the company. Petitioner was physically located some five and one-half hours from the inn; performed no duties or services for the corporation; clearly was not involved

in making business or financial decisions; was not active in day-to-day operations; did not hire or fire employees; and did not sign tax returns or checks. In my view these facts outweigh the indicia which would support that petitioner was a responsible person of TAM.

E. The petition of Barbara Higgins is granted and the four notices of estimated determination dated September 5, 2000 are hereby canceled in full.

DATED: Troy, New York
August 7, 2003

/s/ Brian L. Friedman
PRESIDING OFFICER